IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 489 OF 1990

Bhujanrao s/o Manik Andraskar and others. ... ... **APPELLANTS**

VERSUS

Smt. Kamalabai wd/o Balkrishna Motghare,
and another. ... ... **RESPONDENTS**

Mr. S.A. Bari, Advocate, for the appellants.
None present for the respondents.

CORAM : Smt. V.A. Naik, J.
DATED : JUNE 7, 2007

ORAL JUDGMENT

By this second appeal, the appellants challenge the judgment and decree passed by the Civil Judge, Junior Division, Hinganghat, in Regular Civil Suit No. 252/1977 on 28/2/1985, as also the judgment passed in Regular Civil Appeal No. 37/1985 on 25/1/1990.

2. The facts giving rise to this second appeal are briefly stated as under :

The appellants are the original defendant nos. 3 to 5. The plaintiff had filed a suit against the original defendant nos. 1 and 2, the respondent nos. 2 and 3 herein, for specific performance of agreement of sale of the property involved in the suit. According to the plaintiff, the defendant nos. 1 and 2, by an agreement dated 25/11/1974, agreed to sell 5 acres of land to the plaintiff for a consideration of Rs. 4,000/-. The sale deed was to be executed on 30/8/1975. The defendant nos. 1 and 2 had received an amount of Rs. 1,500/- as earnest money. Though the plaintiff paid Rs. 800/- to the defendant nos. 1 and 2 after execution of the agreement of sale and requested the defendants to execute the sale deed on receiving the balance amount, the defendant nos. 1 and 2 refused to perform their part of the contract and execute the sale deed. The plaintiffs, therefore, instituted the present suit.

3. The defendant nos. 1 and 2 resisted and denied the claim of the plaintiff. It was pleaded by the defendants that the plaintiff was indulging in money-lending business at the relevant time and had advanced a loan of Rs. 1,200/- to the defendants. According to them, the plaintiff had got the earnest note dated 25/11/1974 executed from them as a security towards the repayment of the loan of Rs. 1,200/- and interest of Rs. 300/- thereon.

Since the defendants were unable to pay the loan amount with interest thereon, the plaintiff had filed a frivolous suit against them.

4. It is not in dispute that the defendant nos. 3 to 5, the present appellants, had purchased the suit property during the pendency of the suit, on 21/5/1979. The plaintiff, therefore, amended the plaint and joined the defendant nos. 3 to 5 as party defendants to the suit. The defendant nos. 3 to 5 filed their written statement and resisted the claim of the plaintiff. It was the case of the defendant nos. 3 to 5 that they had purchased the property for a valuable consideration in the year 1979 and they had come to know that the plaintiff was a money-lender and the transaction alleged in the plaint, was a loan transaction and was not an agreement of sale. According to the defendant nos. 3 to 5, plaintiff was not entitled to seek specific performance of the contract. They further claimed that the suit for refund of the earnest amount was not maintainable against them.

5. The trial Court, on an appreciation of the evidence tendered by the parties on record, arrived at a finding that the plaintiff had proved that the defendant nos. 1 and 2 had agreed to sell their property to the plaintiff and an amount of Rs. 2,300/- was paid by the plaintiff to the defendant nos.

1 and 2. The Court held that the plaintiff was ready and willing to perform his part of the contract and the defendant nos. 1 and 2 had failed to prove that the agreement dated 25/11/1974 was got executed towards the security of the loan amount. On the aforesaid findings, the trial Court decreed the suit of the plaintiff for grant of specific performance. The Court held that the defendant nos. 3 to 5 were liable to hand over possession of the property to the plaintiff as they had purchased the suit property during the pendency of the suit.

6. The appellate Court, in the appeal filed by the defendant nos. 3 to 5 against the judgment passed by the trial Court, confirmed the findings recorded by the trial Court and further held that the transaction of sale effected between the defendant nos. 1 and 2 and defendant nos. 3 to 5 on 31/5/1979 was hit by the doctrine of lis pendens under the provisions of Section 52 of the Transfer of Property Act. The judgment passed by both the Courts are challenged by the defendant nos. 3 to 5 in this second appeal.

7. Shri S.A. Bari, the learned counsel for the appellants, submitted that the Courts were not justified in holding that the sale transaction dated 31/5/1979 was hit by the doctrine of lis pendens. According to the counsel

for the appellants, the defendant nos. 3 to 5 were bona fide purchasers of the property without notice and hence the plaintiff's suit was liable to be dismissed. It was further submitted on behalf of the appellants that the notice of the pendency of the suit was not registered and, therefore, there was no occasion for the defendant nos. 3 to 5 to have noticed about the existence of an earlier transaction between the plaintiff and the defendant nos. 1 and 2. It was lastly submitted on behalf of the appellants that the plaintiff had, in the alternative sought for the refund of the earnest amount and the Courts ought to have exercised their discretion by granting the alternate relief to the plaintiff instead of relief of grant of specific performance of contract.

8. When this matter came up before this Court for admission on 19th July, 1994, this Court admitted the second appeal by the following order:

> "Appeal is admitted on the substantive question of law to the effect that whether the transaction between the appellants and the respondent nos. 2 and 3 is barred by section 52 of the Transfer of Property Act?"

9. To answer the aforesaid substantial question of law, it is necessary to peruse the written statement and specifically the pleas raised by the

defendant nos. 3 to 5 therein. A perusal of the written statement filed by the defendant nos. 3 to 5 reveals that it was not the case of the defendant nos. 3 to 5 that they were bona fide purchasers of the property for a valuable consideration without notice of the earlier transaction. It was also not the case of the defendant nos. 3 to 5 that the doctrine of lis pendens could not be made applicable to the facts of the case and the transaction effected in their favour in the year 1979 during the pendency of the suit, could not be hit by the doctrine of lis pendens as the notice of the suit was not registered. In fact, in paragraph no.10 of the written statement, it was pleaded by the defendants that they were aware of the fact that the plaintiff was a money-lender and the alleged transaction of the plaintiff with the defendant nos. 1 and 2 was a loan transaction and was not an agreement of sale. It was also not pleaded by the defendant nos. 3 to 5 that they were not aware about the existence of an agreement of sale dated 25/11/1974 between the plaintiff and the defendant nos. 1 and 2 till they received the suit summons. Thus, it is not the case of the defendant nos. 3 to 5 in the written statement that they were not aware of the pendency of the present suit and had purchased the property in the absence of any notice of the same. The defendant no.3-Bhujangrao examined himself on behalf of the defendant nos. 3 to 5 and deposed that the defendant nos. 3 to 5 were not aware of any agreement of

sale between plaintiff and the defendant nos. 1 and 2 at the time when they purchased the suit property. For the first time, it was brought on record by the evidence of Bhujangrao that the defendant nos. 3 to 5 had no notice of the agreement of sale of the year 1975 and they became aware of the said agreement on receipt of the summons in the instant suit. Bhujangrao deposed that he could not assign any reason why it was not mentioned in his written statement that he became aware about the alleged transaction between the plaintiff and the defendant nos. 1 and 2 after the receipt of the suit summons. Though the defendant nos. 3 to 5 had claimed to have purchased the suit property from the defendant nos. 1 and 2 during the pendency of the suit in the year 1979, it is conspicuous to note that the sale deeds were not produced on record and Bhujangrao admitted in his evidence that he could not assign any reason why he had not filed the copies of the sale deeds on record. It was further admitted by Bhujangrao in his cross-examination that they had not published any notice regarding the transaction of sale and purchase of land between the defendant nos. 1 and 2, and the defendant nos. 3 to 5.

10. Thus, it is apparent from the pleadings of the defendant nos. 3 to 5 as also the evidence tendered on their behalf that it was not the case of the

defendant nos. 3 to 5 that they were the bona fide purchasers of the property for value, without notice of the pendency of the litigation between the plaintiff and the defendant nos. 1 and 2. This aspect was not pleaded by the defendant nos. 3 to 5 in their written statement. In fact, the defendants had pleaded in their written statement and specially in paragraph no. 10 thereof that they were aware that the plaintiff was a money-lender and the transaction executed between the plaintiff and the defendant nos. 1 and 2 was not, in fact, a document pertaining to the sale transaction. It was further not pleaded by the defendants that the notice of the litigation pending between the plaintiff and the defendant nos. 1 and 2 was not registered and, therefore, they were not aware about the pendency of the litigation at the time of execution of the sale deed in the year 1979. In the absence of any pleadings on these two aspects, it cannot be held that the defendant nos. 3 to 5 were bona fide purchasers of the property for value without notice and the transaction of purchase of the property by the defendant nos. 3 to 5 was not hit by the doctrine of lis pendens as the notice of the suit was not registered. This plea was raised for the first time by the defendant nos. 3 to 5 at the appellate stage. In the absence of any pleadings on the aforesaid issue, it cannot be said that the said transaction of the year 1979 was not hit by the doctrine of lis pendens, as Bhujangrao had, for the

first time in his deposition, stated that they became aware of the pendency of the suit after they received the suit summons. No evidence in this regard can be considered by this Court as the evidence is not based on proper pleadings. As already stated herein above, the pleadings are totally absent on the issue of non-registration of the pendency of the suit and that the defendant nos. 3 to 5 had no notice about the suit transaction till they received the suit summons. The appellate Court was, therefore, justified in holding that the sale deeds executed by the defendant nos. 1 and 2 in favour of the defendant nos. 3 to 5 during the pendency of the suit were hit by doctrine of lis pendens under the provisions of Section 52 of the Transfer of Property Act. It is not in dispute that the suit was filed on 17/10/1977 and the defendant nos. 3 to 5 purchased the suit property on 31/5/1979, i.e. during the pendency of the suit. The substantial question of law is, therefore, answered in the affirmative and against the appellants.

11. The submission made on behalf of the appellants that the Courts were not justified in exercising the discretion in favour of the plaintiff when the plaintiff had claimed an alternative relief of refund of earnest amount, is also liable to be rejected. Specific performance is a discretionary relief and both the Courts have concurrently found that the plaintiff was ever ready

and willing to perform his part of the contract and on the facts and circumstances of the case, was entitled to a decree for specific performance of contract. Since the sale deeds executed in favour of the defendant nos. 3 to 5 are hit by the doctrine of lis pendens, the defendant nos. 3 to 5 cannot claim any right superior to that of the defendant nos. 1 and 2 merely because the plaintiff has also sought alternate relief for refund of the earnest amount. It, therefore, cannot be said that the Courts were not justified in exercising the discretion in favour of the plaintiff in granting the relief of specific performance of contract in stead of the relief of refund of earnest amount.

12. For the reasons aforesaid, the second appeal fails and hence dismissed with no order as to costs.

(Smt. V.A. Naik)
Judge

RMP